444. With respect to local markets, our ten city study and our DI test cases reveal that most local markets today are well-functioning, healthy markets for speech.[960] For example, as of 2000, the largest media market in the country, New York City, had 184 different media outlets owned by 114 different owners.[961] Perhaps more impressively, the Burlington/Plattsburgh market – market 141 out of 287 – had 53 outlets owned by 34 different owners.[962] Even Altoona, Pennsylvania, market 255, had 23 outlets owned by 15 different owners.[963] That is, in the 255th ranked market, there currently are fifteen different independent voices.

445 Not all voices, however, speak with the same volume. Using our Diversity Index, we have examined the concentration of media outlets in the ten markets that were the subject of our Ten City Study using weighted voices. New York has a base DI for local news and information of 373; Lancaster, Pennsylvania, has a DI of 939; and Myrtle Beach, South Carolina, has a DI of 989.[964] Indeed, the average DI for all ten markets, which range from the largest to near the smallest, is 758.[965] A DI of 758 is the equivalent of 13 equally-sized firms.

446. Moreover, to ensure that the results of our ten city study were not anomalous, we have calculated the average DI for a different set of randomly selected markets, both large and small.[966] The average DI for markets in which there are 20 television stations is 612; the average DI for markets in which there are 15 television stations is 595; the average DI for markets in which there are 10 television stations is 635, and the average DI for markets in which there are 5 television stations is 911 – all well below the point at which one would characterize them as highly concentrated if one were using the analogous HHI to measure competition in the market.[967]

447. We believe the analogy to the HHI is apt The HHI is an indicator of economic concentration; it provides an analytical framework for determining when and if an entity or group of entities is likely to wield market power in an economic market Our DI, which was inspired by and

[960] *See* MOWG Study No 1

[961] *Id* Even though both MOWG Study No. 1 and Appendix C (Diversity Indices in Ten Sample Markets Study) used the same media markets, the number of outlets and owners in individual markets as described in MOWG Study No 1 are different from the number of outlets and owners in Appendix C, Diversity Indices in Ten Sample Markets, for two reasons First, MOWG Study No 1 used outlet and ownership data that was current in 2000, in order to make a comparison between 1960 and 1980 The Diversity Indices in Ten Sample Markets Study used more current outlet and ownership data from 2002, in order to be more up-to-date. In addition, MOWG Study No 1 included the "embedded" radio metro markets that are physically in the NYC metro, for illustrative purposes. The Diversity Indices in Ten Sample Markets Study used only the radio stations assigned to the NYC metro, for analytical purposes

[962] *Id*

[963] *Id*

[964] *Id*

[965] *Id*

[966] *See* Appendix D, Diversity Index Scenarios

[967] *Id*

modeled after the HHI, similarly is an indicator of viewpoint concentration. Using the DI as an analytical tool, we can assign approximate weights to different types of media outlets, account for the diversity effects of commonly-owned properties, and measure relative concentration between and among markets. The DI can help us, therefore, identify the point at which an entity or group of entities is likely to wield inordinate power in the marketplace of ideas.

448 Although competition theory does not provide a hard-and-fast rule on the number of competitors necessary to ensure that the benefits of competition are realized, a market that has ten or more equally- sized firms normally can be considered fully competitive.[968] A 1000 DI correlates to market in which there are roughly ten firms with approximately equal market power. An 1800 DI would correspond to a market with six roughly equal voices. Using our DI analysis of sample markets, we note that it is not until we reach markets with three or fewer licensed television stations that the average DI exceeds 1000, the point at which the market normally would be characterized as moderately concentrated for competition purposes.[969]

449 Our DI analysis of these sample markets, however, is not the end of our inquiry. Because of the importance we associate with maintaining diversity among the three principal platforms – newspaper, radio and television – for the expression of viewpoint at the local level, and because these same three outlets produce a large share of local news content,[970] we previously have used a "voice test" focused on one or more of these outlets for measuring diversity. Indeed, the *Sinclair* court suggested that our choice of an eight-voice test, then used in conjunction with the local television rule, was an exercise of agency discretion entitled to some deference.[971] Although we no longer are willing to base our rules upon the comparatively rudimentary eight-voice test, we continue to believe that unacceptable diversity losses can occur in very small markets when the principal distribution platforms for local news content come under common ownership and control In larger markets, we expect that the number of distribution outlets for local news content will be larger, and that consumers will have greater access to secondary outlets for news and information [972]

450. Finally, we are concerned not merely with the absolute level of diversity that might already exist in any market or type of market, but also with the degree to which diversity might be sacrificed as a result of likely transactions Accordingly, in defining "at-risk" markets, we have used our DI and sampled the effect of transactions, in large and small markets, involving heavily used sources of local

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[968] A market with 10 or more equally-sized firms has an HHI of 1000 or less. DOJ/FTC regards markets in this region to be unconcentrated Mergers resulting in unconcentrated markets are unlikely to have adverse competitive effects and ordinarily require no further analysis. *See DOJ/FTC Merger Guidelines* § 1 51.

[969] *See* Appendix D, Diversity Index Scenarios. The average DI for markets with three television stations is 1027; the average DI for markets with two television stations is 1316; and the average DI for markets with a single television station is 1707

[970] CFA Comments at 32-39, UCC Comments at 23

[971] *Sinclair*, 284 F 3d at 162

[972] *E g* , *Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, 15 FCC Rcd 20913, 20918 (2000) (broadband access in rural areas limited), *2001 Price Survey Report*, 17 FCC Rcd 6301, 6318 (2002) (low capacity cable systems in rural areas offer fewer channels and are less likely to have stand-alone local or regional cable news channels)

news and information[973] In so doing, we have focused on the types of transactions that most likely will lead to large DI changes and rapid concentration Our line-drawing effort is informed by the approach the DOJ has taken in assessing competition issues Although DOJ policy is to review any transaction in a moderately concentrated market that would result in a change in HHI of 100 points or more, we have found no case in many years in which DOJ has filed suit to block a merger that produced less than a 400 or more point HHI change.[974] Based on our analysis, cross-media combinations involving newspaper and television, newspaper and radio, or radio and television properties do not produce a change in the DI of anything even approaching that magnitude other than in markets with three or fewer television stations.[975] For example, a newspaper/radio combination in markets with only two licensed television stations produces a DI change of more than 300 points, a television/radio combination in markets of that size produces a DI change of 301 points, and a newspaper/television combination in markets of that size produces a DI change of 731 points A newspaper/television combination in a market with three licensed television stations produces a DI change of 331 points[976]

451. These changes, of course, reflect approximations based upon sample data and are provided only to be illustrative of the diversity losses that can occur as a result of cross-media combinations in small markets Nonetheless, based on all of the foregoing, we conclude that a market with the equivalent of ten or more equally-sized firms cannot be regarded as even moderately concentrated for diversity purposes In light of that conclusion, and in consideration of the properties of small markets and on our analysis of potential transactional impacts in those markets, we conclude that markets with three or fewer licensed television stations should be regarded as "at-risk" markets for purposes of diversity concentration. Markets of that size, we expect, will be moderately concentrated and subject to rapid concentration if cross-media combinations are created involving radio, television and/or newspaper properties[977] Accordingly, we will prohibit certain cross-media combinations involving those properties

[973] *See* Appendix D, Diversity Index Scenarios.

[974] Under the *FTC/DOJ Merger Guidelines*, an HHI between 1000 and 1800 suggests a moderately concentrated market, and an HHI above 1800 suggests a highly concentrated market Where the post-merger market would be in the moderately concentrated range, the *Guidelines* suggest that a merger that increases the HHI by more than 100 points will, absent other factors, present antitrust concerns Where the post-merger market would be in the highly concentrated range, the *Guidelines* suggest that a merger producing an increase in the HHI of more than 100 points, absent other factors, is presumed to create or enhance market power or facilitate its exercise *FTC/DOJ Merger Guidelines* ¶ 1 51 However, in the cases we found over the past 15 years, the FTC or the DOJ has filed suit to block a merger only when the change in the HHI is at least four times greater than the *Guideline's* standards. *See, e g*, *FTC v Illinois Cereal Mills, Inc.*, 691 F Supp 1131 (N.D. Ill., E. Div. 1988), *U.S. v. Georgia-Pacific Corp*, 1996 W L 634212 (D. Del 1996) In the majority of cases, the proposed merger would have resulted in a change in the HHI in excess of 1,000 points.

[975] *See* Appendix D, Diversity Index Scenarios

[976] The calculated changes in the Diversity Index for these markets are premised on the assumption that the radio markets have consolidated to the maximum extent permissible under our new local radio ownership rule On this basis, this is a "worst case" estimation of the impact of newspaper/radio and television/radio combinations under the Diversity Index.

[977] A market with an HHI of more than 1800 is regarded as highly concentrated We noted above that a DI of 1800 would correspond to six equally-sized "voices" Because of the amorphous nature of diversity as an interest and the difficulty of measuring it with precision, we decline to draw an absolute line prohibiting transactions that (continued)

in markets with three or fewer television stations.[978]

d. Local Cross-Media Limits in At-Risk Markets

452 With respect to the limits themselves, we tread lightly in view of the sensitive First Amendment interests at stake and the deregulatory purpose of Section 202(h). Our intent is to draw our rules narrowly, focusing on those transactions that are likely to have a substantial impact on the diversity of voices available in the market. The record shows that broadcast television, daily newspapers, and broadcast radio are the three media platforms that Americans turn to most often for local news and information.[979] They are, accordingly, the focus of our diversity concerns, and we decline to impose any cross-media limit on transactions involving media properties other than radio, television, and newspaper outlets.

453. Further, we are establishing rules of nationwide applicability. We desire, therefore, to provide the industry and the public with clear, easy to administer rules reflective of common market trends and characteristics We recognize that, in any given market, the lines we draw here may appear under- or over-inclusive. Indeed, that quality inheres in the nature of proscriptive rules themselves. Nonetheless, our analysis of the record in this proceeding gives us confidence that our rules will prevent the transactions that would seriously impair the availability of diverse viewpoints in any local market while permitting efficiency enhancing combinations. Again, although they have a methodological foundation in the DI, these judgments are based on agency expertise and experience dealing with broadcast markets and the media industries generally. Accordingly, except as specifically prohibited herein, cross-media combinations will not be subject to anything other than routine Commission review, i e., unless the transaction is barred by the CML or our other ownership rules, the combination is permissible under our rules, and we will not apply the DI to it.[980]

454 As explained below, combinations of daily newspaper and broadcast properties in at-risk markets present a serious threat to local viewpoint diversity.[981] We therefore, adopt a rule prohibiting common ownership of broadcast stations and daily newspapers, and TV/radio combinations, in markets

(Continued from previous page)
would take a market beyond the 1800 DI (*i e.*, six voice) level The rules we are adopting herein, however, are intended to protect against markets becoming highly concentrated – in a qualitative sense – for diversity purposes.

[978] When we originally crafted the newspaper/broadcast rule we required divestiture of either a newspaper or a broadcast station in a limited number of so-called "egregious" cases. We defined the relevant market in those cases as the area encompassed by the city-grade signal of the relevant broadcast station Divestiture was required where the only daily newspaper was published in a community within the city-grade signal of the only commercial television (or only commercial radio station in cases where no local TV station also existed) where the newspaper and the broadcast station were commonly owned *See generally 1975 Second Report and Order, supra* note 33

[979] *See* MOWG Study No 8, Table 97

[980] Bright lines provide the certainty and predictability needed for companies to make business plans and for capital markets to make investments in the growth and innovation in media markets. Conversely, case-by-case review of even below-cap mergers on diversity grounds would lead to uncertainty and undermine our efforts to encourage growth in broadcast services Accordingly, petitioners should not use the petition to deny process to relitigate the issues resolved in this proceeding

[981] *See, e g* , NABOB/Rainbow, PUSH Comments at 23-24, Gray Comments at 16-19.

with three or fewer television stations. In order to determine which markets have 3 or fewer broadcast television stations, we will rely on Nielsen television Designated Market Areas (DMAs) We include for these purposes, commercial and noncommercial television stations assigned to the DMA This is consistent with our overall measurement of the DI, explained above, as we assume that all television stations in the DMA are viewable in the radio metro with which it is paired.[982]

455. A number of parties have questioned whether a cross-ownership rule applicable to entities other than broadcasters, *e.g* , newspaper owners, would be constitutional.[983] We continue to believe that a narrowly-drawn rule prohibiting or limiting common ownership of broadcast properties and daily newspapers is consistent with our constitutional framework. Our current newspaper/broadcast cross-ownership rule has been upheld by the Supreme Court against constitutional challenge[984] and, as discussed above,[985] broadcast/newspaper and radio/television cross-ownership rules, like broadcast ownership rules, are reviewed under the rational basis standard.[986] We believe that our new cross-media limits satisfy this standard because they are "a reasonable means of promoting the public interest in diversified mass communications,"[987] and they are founded on a substantial record. Nevertheless, we are mindful of the court's concern in another context, where a higher standard of constitutional scrutiny applied, that our rules should focus on those markets and transactions that are likely to result in substantial, rather than only incremental, changes in diversity.[988] Our new cross-ownership rules accomplish this because they are narrowly tailored to restrict cross-ownership only in select markets.

456. *Television-Newspaper.* Nielsen survey data reveal that daily newspapers and broadcast television remain the two most important sources of local news and information.[989] The importance of these outlets is reflected in our DI As noted above, a combination of a daily newspaper and a television station in a market with only three television stations leads to an average DI change of 331 points. These combinations in markets with only two or one television station lead to DI changes of 731 and 910 DI points, respectively In these at-risk markets, a single combination of a daily newspaper and a television station could quickly jeopardize the range of viewpoints available to consumers in the market. We therefore, adopt a rule prohibiting the combination of a daily newspaper and a broadcast television facility

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[982] *See* ¶ 428, *supra*

[983] Media General Comments at 37; Tribune Comments at 17-28, Fox Comments at 50-51.

[984] *See NCCB, supra*, note 20

[985] *See* Legal Framework, Section II, ¶¶ 13-16, *supra*

[986] *Id*

[987] *NCCB*, 436 U S at 802.

[988] *Time Warner II*, 240 F.3d at 1135.

[989] Approximately 28.8 percent of Americans rely on newspapers as a source of local news and information, and 33 8 percent use broadcast television for this purpose. These figures are derived from normalizing the figures in MOWG Study No. 8, Table 097. Because respondents were asked what sources they had used in the previous 7 days for local news and information, and because many respondents listed more than a single source, the totals in the Table add up to more than 100%. Also, magazines were excluded from the normalizing process as they typically are not sources of local news

in any market with three or fewer television properties. To trigger the rule, we will count all television stations assigned to the DMA that contains the newspaper's community of publication. We presume that broadcast television stations are generally carried throughout the DMA to which the station is assigned. Our rules will not, however, bar a broadcast television station in such a market from starting a new newspaper, as that would expand, not decrease, diversity.

457. One additional issue in the cross-interest context is the definition of "daily newspaper" for the purposes of newspaper/broadcast cross-ownership. Currently, Note 6 to the multiple ownership rule defines a daily newspaper as "one which is published four or more days per week, which is in the English language and which is circulated generally in the community of publication."[990] Commenters raised the issue of the English language requirement when applied in Puerto Rico where the Spanish language is the dominant language [991] Caribbean argues that the Commission expressly rejected requests to exempt Puerto Rico from the rule at the time of its adoption and recognized that the goals underlying the rule were of equal concern in Puerto Rico as on the mainland.[992] Both Caribbean and Arso argue that the exclusion of foreign language newspapers also allows for the exercise of market power by the dominant newspapers in Puerto Rico which, due to the exclusion of non-English newspapers, could be owned in tandem with broadcast stations in the market.[993]

458. The exclusion of non-English language daily newspapers in areas where the dominant language of the market is not English creates a discrepancy in treatment that must be ended. As Caribbean notes, in adopting the original newspaper/broadcast cross-ownership rule, the Commission recognized that the need for diversity in Puerto Rico was the same as that elsewhere. Since the definition of a daily newspaper was adopted in 1975, the percentage of households in which Spanish has spoken has approximately doubled.[994] It is appropriate, therefore, at this point in time, that we apply the CML to non-English daily papers in markets in which the language that they are printed in is the dominant language of their market.[995] While the example of Puerto Rico was addressed in the comments, there may be other communities to which this will apply now or in the future. Those whose primary language is not English deserve the same protections of diversity and competition as do English speakers Accordingly, for purposes of applying the CML to newspaper/broadcast transactions we will change the definition of daily newspapers to include non-English dailies printed in the primary language of the market.

459. *Radio-Newspaper.* Although broadcast radio generally has less of an impact on local

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[990] 47 C.F.R. § 73 3555 Note 6.

[991] Arso Comments at 1-4, Caribbean Comments in MM Docket No 01-235 at 22-35.

[992] Caribbean Comments in MM Docket No 01-235 at 22.

[993] *Id.* at 30-38. Arso Comments at 3-4

[994] In 2000, Spanish was the language spoken at home in 10.5 % of American households *See* www census gov. In 1980, the percentage was 5.3% This is derived from data contained in INFORMATION PLEASE ALMANAC (Otto Johnson ed , Houghton Mifflin Co. 1995) at 835.

[995] As previously indicated, to trigger the rule, we will count all television stations assigned to the DMA that contains the newspaper's community of publication. For the purposes of evaluating whether the non-English daily is printed in the primary language of the "market," however, the market shall be defined as the newspaper's community of publication.

diversity than broadcast television, according to the results of our Nielsen survey, discussed above, in at-risk markets the combination of a daily newspaper with one or more broadcast radio facilities can nonetheless have significant negative implications for the range of viewpoints available. Indeed, markets with three or fewer television stations have, on average, only 21 radio stations.[996] Under our radio cap, a single owner in a market with 21 stations could own six stations, or 29% of all the radio outlets in the market. Combining such a station group with, perhaps, the only daily newspaper could, therefore, seriously impair the range of independent viewpoints available in the market.[997] Again, based on a sample of markets with three or fewer television outlets, we find that the change in DI as a result of a newspaper-radio combination, assuming that the radio owner has reached the radio ownership cap under our new local rules, would be 242 points or higher.[998] Given that markets of three television outlets begin with an average DI of 1027, which we regard as the beginning of the moderately concentrated range, a 242 point DI increase moves the market substantially toward a highly concentrated state We therefore, adopt a rule prohibiting the combination of a daily newspaper and a broadcast radio facility in any market with three or fewer television properties [999] To trigger the rule for newspaper/radio combinations we will retain our current standard. That standard requires complete encompassment of the newspaper's community of publication by the requisite signal strength contour of the commonly owned radio station(s).[1000]

460 *Television-Radio* Combinations involving daily newspapers and broadcast properties are not the only cross-media combinations that present diversity concerns in at-risk markets. Approximately

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[996] BIA Master Access Data Base (Nov 2002)

[997] Although any given market may have more than one daily newspaper, and of course every radio owner does not buy stations up to the regulatory limit, we are adopting general rules of nationwide applicability. Accordingly, we are positing for these purposes that the market is as concentrated as possible consistent with our other local rules

[998] *See* Appendix D (Diversity Index Scenarios)

[999] Again, we note that this rule does not apply in the event that a broadcast licensee seeks to found a new daily newspaper in the market

[1000] For AM radio stations that standard is complete encompassment of the newspaper's community of publication by the predicted or measured 2mV/m contour computed in accordance with § 73 183 or § 73.186 of the Commission's Rules For FM radio stations the standard is complete encompassment of the newspaper's community of publication by the 1 mV/m contour computed in accordance with § 73.313 of the Commission's Rules Previously, we discussed the inherent flaws in defining radio markets using a contour-based definition, and decided to move to a geographic based definition Specifically, we found that a contour based definition for defining radio markets can create inconsistencies in counting stations that comprise a market, counting stations that an entity owns in a market, and determining a radio market's size and geographic area *See* Local Radio/Problems with the Existing Radio Market Definition and Counting Methodologies, Section VI(B)(1)(a)(ii)(a), *supra*. However, such problems do not arise in the context of using contours to determine whether the cross-media limits rule is triggered. Here, we are concerned with the physical proximity of the broadcast station and the newspaper's community of publication, or in the case of radio/television cross-ownership, we are concerned with the relative distance between two specific stations. Because the cross-media rule relies, in part, on a geographic location, *i e* the community of publication or the communities of license, parties cannot take advantage of such discussed inconsistencies to circumvent the rules. Moreover, we are not relying on a contour-based definition to define a cross-media market, we are only using it to determine whether the rule is triggered.

one-fourth of Americans rely on radio as a source of local news and information, and one-third use broadcast television for this purpose.[1001] Cross-media combinations involving television and radio properties also, therefore, are likely to give rise to systematic diversity concerns in at-risk markets. Our DI analysis confirms this fact.[1002] We therefore adopt a rule prohibiting the combination of broadcast radio and broadcast television facilities in any market with three or fewer television properties. In such markets, we will not permit an owner of a TV station to own any radio stations in the market, and vice versa Although this modification is more stringent than our current radio/TV cross-ownership rule in a limited number of markets,[1003] the overall thrust of our CML approach has been to eliminate regulatory restrictions where they are unnecessary.[1004]

461 The television/radio cross-ownership rule is triggered when the radio station's community of license is in the commonly owned television station's DMA. Similar to requests for waiver of the newspaper/broadcast cross-ownership rule, parties seeking waiver of the television/radio cross-ownership rule can rebut this by showing that the stations' signals do not overlap and the television station is not carried on cable systems in the radio station's market.

5. Additional Cross-Media Limits in Small to Medium-Size Markets

462 Although markets with four or more licensed television stations do not qualify, in our judgment, as at-risk markets, a combination of a daily newspaper with a television duopoly and a significant radio presence can, in small to medium-size markets result in substantial changes in the level of diversity. For example, assuming that owners of broadcast properties are constrained only by our local radio and television caps (*i e.*, they may acquire stations up to the cap in either service), a newspaper owner might attempt to acquire a television duopoly and several radio properties within the same market. Referring again to our sample markets we find that, in a five-television market, a combination of a newspaper, a television duopoly, and as many radio stations as permitted by the applicable local radio cap results in an average DI change of 846 points. Indeed, even in an eight-television market, the resulting average DI change from such a newspaper/TV duopoly/radio combination DI is 734 points Given that eight-television markets begin, on average, with a DI of almost 900 points, changes of this magnitude can lead quickly to a highly concentrated market

463 We notice a dramatic difference, however, in the base DI, and in the DI changes that result from a combination involving a newspaper, a TV duopoly, and a radio station group, between our sample markets that have four to eight television stations and those that have nine or more television stations. The base DI for markets with eight television stations is still almost 900 points – nearly in the moderately concentrated range, there is almost a 200 point difference between these markets and those with nine

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[1001] MOWG Study No. 8, Table 097 The figures above are derived from normalizing the figures in Table 097. Because respondents were asked what sources they had used in the previous 7 days for local news and information, and because many respondents listed more than a single source, the totals in the Table add up to more than 100% Magazines were excluded from the normalizing process because they typically are not used for local news.

[1002] *See* Appendix D, Diversity Index Scenarios.

[1003] 47 C F R § 73.3555(c).

[1004] We discuss grandfathering of existing combinations in these markets below See Grandfathering and Transition Section VI(D), *infra* television stations, which, in our sample, have a base case DI of 705 points In addition, although a newspaper/TV duopoly/radio combination produces a change of over 700 points in an eight television market, bringing the DI up to approximately 1600 points, the change is fewer than 500 DI points in a nine television market, bringing the DI up to only 1200 points. These numbers accord with our experience and judgment regarding the operation of small to medium-size markets, and are supported by other evidence in the record.[1005]

464 We also note significant differences between the DI changes that result from newspaper/TV combinations in markets with between four and eight television stations and those with nine or more television stations Using our sample markets, a newspaper combining with a television duopoly in a market with only five television stations leads to an increase in the DI of 376 points. Even in markets with eight television stations, the average DI increase as a result of such a combination is over 300 points. In markets with nine television stations, however, the DI increase from a merger of a newspaper with a television duopoly is only 172 points; it is about 100 points in markets with ten televisions.[1006] The potential for rapid concentration that may result from a combination of a newspaper with a television duopoly in markets with between four and eight licensed television stations ("small markets") leads us to conclude that it would be prudent, in these markets, to impose additional local ownership restrictions as part of our CML.

465. We are cognizant, however, of the fact that substantial public interest benefits may flow from broadcast/newspaper combinations As discussed above, television stations that are co-owned with daily newspapers tend to produce more, and arguably better, local news and public affairs programming than stations that have no newspaper affiliation. Because of the news resources available to local newspapers, we expect similar benefits to be associated with newspaper ownership of radio stations (*e g* , radio stations affiliated with a local newspaper may have an enhanced ability to produce local, all-news radio programming and to cover local political and cultural events in greater depth than stations unaffiliated with a newspaper). Accordingly, we are not inclined to prohibit outright newspaper/ broadcast combinations in markets with 4 – 8 television stations (referred to below as "small to medium size markets").

466. Balancing these interests, we believe it appropriate, in small to medium size markets (those with between four and eight television stations) to allow the following: 1) one entity may own a combination that includes radio, television and newspaper properties, but the entity may not exceed 50% of either of the applicable local radio or the local television caps in the market; 2) a radio station group owner that also owns a newspaper in the market, but which does not own any television properties in the market, may acquire radio stations up to 100% of the applicable radio cap. In these small to medium size markets, therefore, we will prohibit. television broadcasters that also own a daily newspaper in the market from having a television duopoly in that market; a broadcaster with a duopoly from obtaining a daily newspaper in the same DMA; a newspaper owner from purchasing more than a single television station within the DMA; and a radio station owner that also owns a daily newspaper and a television station in

[1005] *See, e g* Buckley Comments at 4-5; UCC Comments at 16-17, 40-41

[1006] Because of the number of radio stations in the markets observed for our sample of seven-television-station markets, the DI increases in those markets are smaller than those in eight TV markets. This deviation does not undermine, in our judgment, the more general conclusions that we draw from the data and from our DI methodology regarding the markets most at risk for viewpoint concentration (*i e* , we do not deem markets with seven television stations, in general, to be less at risk than markets with eight television stations).

the market from exceeding 50% of the applicable radio cap for the market.[1007]

467. We believe that this CML achieves an appropriate balance in small to medium size markets between fostering the production of high quality local programming and protecting diversity. To begin with, the public interest benefits of newspaper ownership (the benefits of cross-fertilization between media) likely are realized primarily in the first broadcast station co-owned in either service. Although there may be economic benefits to the owner from more extensive combinations, it is not as clear that those benefits will accrue to the public in any meaningful way; at least the public interest component of these benefits is likely to decline incrementally as the number of stations increases. Given that no owner will be permitted, in accordance with our local television cap, to hold more than two television stations in a small to medium size market, a limit of one station in these markets for owners of local newspapers will maximize the public interest benefits, while reducing any loss of diversity. Although the loss of diversity that might result were that owner to add a significant radio presence in the market warrants a further 50% limit in the number of radio properties that owner might hold, such is not the case if the combination does not include any television properties.

468 Again, our DI and a set of sample markets help to illustrate the fact that our modified 50% CML for newspaper combinations in small to medium size markets will significantly reduce any loss of diversity that might result from efficiency-enhancing newspaper/broadcast combinations. In a five-television station market, a combination involving a newspaper, a TV duopoly and a radio station group at the radio cap would result in an average DI increase of 846 points, which would take the market to 1757 points, near the highly concentrated range.[1008] If the combination is limited to a single television station and no more than 50% of the applicable radio cap, the DI change is 393 points, a decrease of 453 points. In an eight-television market, a combination involving a newspaper, a TV duopoly, and a radio station group at the cap results in an increase in the average DI of over 700 points. By limiting the combination to 50% of both the television cap and the radio cap, the DI increase is reduced to 314 points.

469. Similarly, whereas a combination involving a newspaper and a television duopoly alone will, on average, raise the DI of a five-television station market by 376 points, a combination involving a newspaper and a single television station in a market of that size will raise the DI, on average, only 223 points The difference is more dramatic in markets with eight licensed television stations, where the average DI increase drops from 308 points to only 152 points for a newspaper/TV duopoly combination. Newspaper/radio group combinations result in significantly lower levels of viewpoint concentration when the combination does not include any TV properties. Accordingly, we will permit newspaper/radio combinations in small to medium size markets, provided they comply with the local radio rule.

470 Similarly, our DI analysis indicates that radio/television combinations in small to medium size markets result in relatively small DI changes For example, in a market with only four television stations, a radio television combination, even assuming the radio owner holds the maximum number of

[1007] For these purposes, we use the Arbitron or contour-overlap market definitions discussed above in determining whether the newspaper and a radio station serve the same market. We are not imposing a limitation that would preclude a top four television station in a market from being combined in common with a newspaper or radio station similar to the restriction imposed in the local television rule context. The top four restriction imposed under the local TV ownership rule is specifically designed to protection competition, as fully discussed in that section. The cross-media limit, on the other hand, is designed to protect viewpoint diversity, not economic competition

[1008] Under the *DOJ/FTC Merger Guidelines*, an HHI above 1800 suggests a highly concentrated market.

stations permitted under our local radio cap, results in a DI change of fewer than 150 points.[1009] Such a combination in a market with eight television stations results in a DI change of fewer than 100 points.[1010]

471. We have engaged in this analysis using our DI and a randomly selected sample of markets not with the idea of slavishly following the numbers that our index generated, but to confirm and support the judgments we make regarding the kinds of markets that are most susceptible to viewpoint concentration, and the kinds of transactions that are most likely to have a significant impact on the level of diversity available in any given market. As noted above, we do not believe that markets with between four and eight television stations can be regarded as moderately concentrated for viewpoint purposes or otherwise "at risk." We do, however, believe, and our DI confirms, that these markets are approaching a level of viewpoint concentration that we would regard as moderate, and we are concerned that some combinations involving the three major sources of local news and public affairs information in these markets would lead to inordinate diversity losses. Accordingly, we will permit television/radio combinations in small to medium size markets, provided they comply with the local radio and television rules.

472 In markets with 9 or more TV stations, we will permit any newspaper and broadcast cross-media combinations that comply with our local TV ownership rule and local radio rule. These tiers are derived from our DI analysis and our judgment as to what markets are sufficiently diverse so that combined newspaper/broadcast ownership would not unduly harm diversity.

473. With respect to markets with nine or more TV stations ("large markets"), we impose no cross-media restrictions. To begin with, markets of this size today tend to have robust media cultures characterized by a large number of outlets and a wide variety of owners. New York City, for instance, which has 23 licensed television stations, 61 radio stations, and 21 daily newspapers, had 61 different owners of broadcast stations and daily newspapers as of November 2002.[1011] Using our diversity index as a measure, New York City today has a base DI of only 373.[1012] More striking, perhaps, is the example provided by Kansas City, Missouri, which has only nine licensed television stations. Our Ten City Study reveals that Kansas City had 35 different owners and our Diversity Index analysis shows that Kansas City has a base DI today of only 509.[1013]

474 Again, to ensure that the results of our Ten City Study were not anomalous, we conducted a DI analysis on a random sample of markets of various sizes, including markets with nine licensed television stations, markets with ten television stations, markets with fifteen television stations, and markets with twenty television stations Among our sample markets, the average DI for those with nine television stations is 705; the average DI for those with ten television stations is 635; the average for those with fifteen television stations is 595; and the average DI for those with twenty television stations is

[1009] *See* Appendix D, Diversity Index Scenarios.

[1010] *Id*

[1011] *See* Appendix C, Diversity Indices in Ten Sample Markets.

[1012] *Id*

[1013] *See* MOWG Study No 1 and Appendix C, Diversity Indices in Ten Sample Markets

612 [1014] That is, markets with nine or more television stations today are very much un-concentrated.

475 The local radio and local television caps adopted herein will help to ensure that large markets continue to be served by a large number of different local media owners. For example, positing Kansas City, Missouri, again as a typical market of nine television stations, and assuming that four television duopolies could in fact be created in that market, and further assuming maximum radio consolidation under our new local radio rule, there should still remain five different owners of television stations and seven different owners of radio stations.[1015] There currently also are five daily newspaper owners serving the market Therefore, even assuming that, in the absence of any cross-media limit in the market, the owners of the radio, television, and newspaper properties combine to the maximum extent possible, there would remain at least seven different owners of local media in the market, each with a significant presence. In accordance with the mandate of Section 202(h), we do not believe that we can justify a restriction in a market where the worst case scenario (indeed, one that may not even be possible given existing combinations in the market), still results in a market with at least seven different owners of the major sources of local news and information

476 More realistically, although some cross-media combinations are likely to occur in the absence of a restriction, constraints imposed by existing groups and the presence of public stations that cannot be acquired by commercial entities make it highly unlikely that Kansas City, or any market, will consolidate to the level described in the preceding paragraph. In order to get a better sense, therefore, for the actual affect of various cross-media combinations in markets with nine or more television stations, we use our DI in sample markets and test hypothetical combinations [1016]

477. Beginning in markets with nine licensed television stations, we see that, on average, the change in DI that would result from a television owner acquiring a radio group consisting of the maximum number of radio stations permissible under our local radio rule is only 64 points.[1017] If instead it were the owner of a daily newspaper acquiring that radio group, the DI change would be 198 points, leaving the market below 1000 DI [1018] If the owner of a daily newspaper were to purchase a television station instead of a large radio group in a market of this size, the DI would increase only 86 points.[1019] Indeed, the largest combination possible in the market -- a combination that would include a daily newspaper, a television duopoly, and a large radio group – would result in a DI increase of 473 points, taking the average nine television market to a base DI of under 1200 points, only marginally in the range

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[1014] *See* Appendix D (Diversity Index Scenarios).

[1015] *See* Appendix C (Diversity Indices in Ten Sample Markets) That is, in a market with nine television stations, four duopolies can, in theory, be created, leaving one singleton station, so that five owners of television stations would remain If there are forty-four radio stations in the market, and group owners assembled the largest combinations possible under the radio cap (seven), there would remain at least seven group owners; six with groups of six stations and one with a group of two stations

[1016] *See* Appendix D (Diversity Index Scenarios).

[1017] *Id.*

[1018] *Id*

[1019] *Id.*

that we would consider moderately concentrated [1020]

478. As detailed in Appendix D (Diversity Index Scenarios), in markets with ten television stations, the average base DI is 635 and the increase that would result from the assemblage of the largest media combination possible would be 292 points – leaving the market un-concentrated.[1021] In markets with fifteen television stations, the average base DI is 595 and a newspaper/television duopoly/large radio group combination would increase the DI only 302 points.[1022] Similar results obtain in markets with twenty television stations.

479. This analysis is premised on the creation of very large combinations of media properties at the local level Even so, the results show that markets with nine or more television stations are un-concentrated today and are unlikely to become highly concentrated even in the absence of cross-media limits Section 202(h) requires that we justify broadcast ownership limits on more than supposition or inchoate fears; our governing law requires that we target our structural limits at real and demonstrable harms Based on the foregoing, we cannot, therefore, justify cross-media restrictions in markets with nine or more licensed television stations.

480. The tiers adopted above – "at-risk" markets, "small to medium size" markets, and "large" markets – are derived from our DI analysis and our independent judgment regarding market operation and the effect of various combinations on diversity. Our diversity concerns are greatest in at-risk markets and we have accordingly prohibited all forms of cross-media combinations in those markets. In small to medium markets we have imposed specific limitations on particular kinds of combinations that would, in our estimation, most likely result in unacceptable harm to viewpoint diversity. In large markets, our analysis indicates that no cross-media limit is necessary, nor can one be justified, given the large number of outlets and owners that typify these markets and the operation of our intra-service television and radio caps.

481 *Conclusion.* Although we generally prohibit television-radio, and newspaper-broadcast, cross-ownership in at-risk markets, and we limit newspaper-broadcast combinations in small to medium size markets, we recognize that special circumstances may render these cross-media limits unnecessary or counter-productive in particular markets. Accordingly, we will continue to entertain requests for waiver of these cross-media limits and, in particular, will give special consideration to waiver requests demonstrating that an otherwise prohibited combination would, in fact, enhance the quality and quantity of broadcast news available in the market [1023] In addition, of course, we will review our entire local broadcast ownership framework, including our new cross-media limits, beginning next year, in our 2004

[1020] *Id*

[1021] *Id*

[1022] *Id*

[1023] As is the case with our new local television ownership rules, we will require that a licensee who obtains a waiver of our cross-media limits show at renewal time the benefits that have accrued to the public as a consequence of the waiver At the end of the broadcast station's (or stations') license term(s), the licensee of the station(s) must certify to the Commission that the public interest benefits of the Commission's grant of the waiver are being fulfilled This certification must include a specific, factual showing of the program-related benefits that have accrued to the public Cost savings or other efficiencies, standing alone, will not constitute a sufficient showing biennial review We will not, however, permit collateral attack upon our rules in individual cases on diversity grounds based upon more particularized showings using the DI in a given market. The rules we adopt herein are rules of general applicability The lines that have been drawn and the judgments that have been made reflect our conclusions regarding the probable effects of given transactions in the run of cases Those conclusions necessarily rely upon generalizations, approximations, and assumptions that will not hold true in every case. Indeed, many of these assumptions would not be true in a particular context or specific market As we stated above, the Diversity Index itself is a blunt tool capable only of capturing and measuring large effects and general trends in typical markets It is of no use, therefore, for parties to attempt to apply the DI to a particular transaction in a particular market.

D. Grandfathering and Transition Procedures

1. Grandfathering Provisions

482 *Existing Combinations* There may be some existing combinations of broadcast stations that exceed the new ownership limits due to the modifications of both the local TV and the local radio ownership rules. Because the modified local TV rule permits increased common ownership of local TV stations, we expect few existing ownership combinations to violate the rule adopted herein. However, some existing same-market combinations may not comply with the modified TV ownership rule because of the elimination of the Grade B overlap exclusion that is in the current rules. In addition, there may be instances in which a party currently owns a radio/television combination that may not comply with the new cross-media limits.[1024]

483 As for radio, we are modifying the definition of many radio markets, replacing the existing signal-contour based definition with a geographic based market definition.[1025] This may result in a different number of stations being considered as participating in a local radio market. Because our radio ownership rule is based on a tiered system, if fewer stations comprise the radio market, and the market falls into a smaller tier, then the number of stations an entity may own would decrease. We also are attributing in-market radio JSAs, which could increase the number of radio stations that count toward an entity's numerical ownership limit.

484. We are persuaded by the record to grandfather existing combinations of radio stations, existing combinations of television stations, and existing combinations of radio/television stations.[1026] As such, we will not require entities to divest their current interests in stations in order to come into

[1024] While we are not aware of any existing newspaper/broadcast combinations that have been previously grandfathered or approved by the Commission that would be barred under the new rules, to the extent such combinations do exist, they will be subject to the grandfathering and transferability provisions described in this section

[1025] We are retaining a modified contour-based definition outside of Arbitron markets until we have completed a rulemaking to define geographic radio markets in these areas. The grandfathering and transition procedures adopted herein apply to Arbitron and non-Arbitron areas. In areas not defined by Arbitron, through the completion of the rulemaking, licensees should apply the modified contour-based market definition for these purposes

[1026] We requested comment on grandfathering issues in the Radio NPRMs: *Radio Market Definition NPRM,* 15 FCC Rcd at 25081-82 ¶ 11; *Local Radio Ownership NPRM,* 16 FCC Rcd at 19888 ¶ 65 compliance with the new ownership rules[1027] As suggested by commenters, doing so would unfairly penalize parties who bought stations in good faith in accordance with the Commission's rules.[1028] Also, we also are sensitive to commenters' concerns that licensees of current combinations should be afforded an opportunity to retain the value of their investments made in reliance on our rules and orders. We also agree with the commenters that argue that compulsory divestiture would be too disruptive to the industry.[1029] On balance, any benefit to competition from forcing divestitures is likely to be outweighed by these countervailing considerations

485 While commenters overwhelming support grandfathering existing combinations, many nonetheless argue that grandfathering will create competitive imbalances which favor existing group owners - those that assembled combinations under the current rules - and disfavor those that cannot assemble competing combinations because of new ownership restrictions.[1030] Like all grandfathering decisions, some disparity will exist between grandfathered owners and non-grandfathered owners. We do not believe this fact outweighs the equitable considerations that persuade us to grandfather existing combinations

[1027] Secret proposes that we grandfather general radio station ownership limits for markets rather than grandfathering specific ownership combinations. In the alternative, it proposes that we permit any broadcaster to own at least as many stations as the largest group owns presently in the specific market Secret Comments in MM Docket No 00-244 at 4 Secret's approach is administratively problematic, requiring the Commission to create and monitor a range of numerical limits in all of the Arbitron metros, as well as in non-Arbitron areas Moreover, it would create disparate treatment in radio markets, not based on competitive analysis or public interest assessment, but based solely on existing combinations. Because these existing combinations were created using the current contour-based market definition, which we find does not promote our competition goals, some combinations may raise competition concerns and may violate the new rules To allow additional groups to obtain the same numerical limits would only exacerbate such concerns.

[1028] *See, e g* , NAB Comments in MM Docket No 01-317 at 50, WVRC Comments in MM Docket No 01-317 at 35, Cumulus Comments in MM Docket No 01-317 at 20, Eure Comments in MM Docket No 01-317 at 5, HBC Comments in MM Docket No. 01-317 at 13, n 2, MBC Comments in MM Docket No 01-317 at 11-12; Clear Channel Reply Comments in MM Docket No 01-317 at n 5; MBC Reply Comments in MM Docket No 01-317 at 4, Zimmer Comments in MM Docket No. 00-244 at 7; Weigle Comments in MM Docket No. 00-244 at 6, NAB Comments in MM Docket No 00-244 at 29-30, Entercom Comments in MM Docket No. 00-244 at 7.

[1029] NAB Comments in MM Docket No. 01-317 at 50, MBC Reply Comments in MM Docket No 01-317 at 4; Zimmer Comments in MM Docket No 01-317 at 7-8, NAB Comments in MM Docket No. 00-244 at 29-30. We disagree with the commenters that support divestitures of current combinations. *See* Dick Broadcasting Comments in MM Docket No 01-317 at 6-7, Idaho Wireless Comments in MM Docket No. 01-317 at 8; NABC Comments in MM Docket No 01-317 at 17. The Commission has required divestitures of existing combinations pursuant to changes in media ownership rules in "egregious cases " *1975 Multiple Ownership Second Report and Order*, 50 F.C.C 2d at 1049.

[1030] NAB Comments in MM Docket No 01-317 at 48, WVRC Comments in MM Docket No. 01-317 at 26; Blakeney Comments in MM Docket No 01-317 at 2; Cox Comments in MM Docket No. 01-317 at 12; Daugherty Comments in MM Docket No 01-317 at 4; Davis Comments in MM Docket No. 01-317 at 2; MBC Reply Comments in MM Docket No 01-317 at 3; NABOB Reply Comments in MM Docket No. 01-317 at 8; Secret Comments in MM Docket No 00-244 at 3; NAB Comments in MM Docket No 00-244 at 8, 9, n.15; Brill Comments in MM Docket No. 00-244 at 1; Aurora Comments in MM Docket No 00-244 at 27, Great Scott Reply Comments in MM Docket No 00-244 at 2.

486. We expect that the issue of grandfathering existing combinations will affect predominately radio group owners because of the changes we make herein to the radio market definition. We recognize that a geographic based radio market definition may result in a fewer number of stations in certain markets. In those instances, parties may not be able to acquire the same number of stations as the largest owner in a particular market [1031] However, those combinations were created based upon the contour-based definition that we find herein fails to adequately address our competition goals in local radio markets To allow additional broadcasters to obtain such combinations would disserve our goals. Our decision to grandfather existing combinations simply reflects the substantial equitable considerations discussed above, considerations that we conclude outweigh our interest in improving the precision of our radio market definition in these particular cases

487. *Transferability*. We also asked for comments on whether to allow licensees to assign or to transfer control of grandfathered combinations that violate of the new ownership rules.[1032] In general, we will prohibit the sale of existing combinations that violate the modified local radio ownership rule, the local television ownership rule, or the cross media limits.[1033] Therefore, parties must comply with the new ownership rules in place at the time a transfer of control or assignment application is filed. However, as discussed earlier, in order to help promote diversity of ownership,[1034] we will allow sales of grandfathered combinations to and by certain "eligible entities." We do not agree with commenters that advocate allowing grandfathered combinations to be freely transferable in perpetuity, irrespective of whether the combination complies with our adopted rules.[1035] As NABC, Idaho Wireless, and ARD suggest, such an approach would hinder our efforts to promote and ensure competitive markets.[1036] Grandfathered combinations, by definition, exceed the numerical limits that we find promote the public interest as related to competition. Moreover, in the case of radio ownership, these combinations were created pursuant to a market definition that we conclude fails to adequately reflect competitive conditions. Unlike our decision not to require existing station owners to divest stations, here, the threat to competition is not outweighed by countervailing considerations. Buyers will be on notice that ownership

[1031] At the same time, however, we believe that the impact on radio owners will be mitigated because we are retaining, not decreasing, the current numerical caps, counting non-commercial stations as participants in the market, and counting any station licensed in the Arbitron market whether or not it meets Arbitron's minimum audience share requirements. In addition, a geographic based definition will allow for more regional consolidation of radio stations than our prior contour based approach

[1032] *Definition of Radio Markets NPRM*, 15 FCC Rcd at 25081 ¶ 11; *Local Radio Ownership NPRM*, 16 FCC Rcd at 19888 ¶ 65

[1033] Likewise, modification of the facilities of a station in a grandfathered combination will be prohibited if the proposed modification would create a new violation of the ownership rules

[1034] *See* Policy Goals, Section III(A)(5), *supra*

[1035] Cumulus Comments in MM Docket No 00-244 at 9, Clear Channel Comments in MM Docket No 00-244 at 5, Entercom Comments in MM Docket No. 00-244 at 7, Citadel Comments in MM Docket No. 00-244 at 12; Viacom Comments in MM Docket No. 00-244 at 8; NAB Comments in MM Docket No. 00-244 at 29, Great Scott Reply Comments in MM Docket No 00-244 at 3, Zimmer Comments in MM Docket No 00-244 at 7, NAB Comments in MM Docket No. 01-317 at 50; Clear Channel Comments in MM Docket No. 01-317 at 26, MBC Comments in MM Docket No 01-317 at 12.

[1036] NABC Comments in MM Docket No 01-317 at 17; Idaho Wireless Comments in MM Docket No 01-317 at 7, ARD Reply Comments in MM Docket No. 00-244 at 2.

combinations must comply at the time of the acquisition of the stations Thus, they do not have the same expectations as present owners who acquired stations under the current ownership rules. In addition, because of the limited number of broadcast licenses available, station spin-offs that would be required upon sales of stations in a grandfathered group could afford new entrants the opportunity to enter the media marketplace. They could also give smaller station owners already in the market the opportunity to acquire more stations and take advantage of the benefits of combined operations. Because divestitures are not required until a sale of the station groups, owners have sufficient time to minimize any specific complications due to joint operations [1037] Therefore, we reject the argument that prohibiting transfers of station groups that exceed the new ownership limits would be unacceptably disruptive or would negatively impact the availability of bank financing, as some commenters suggest.[1038] Finally, requiring future assignments and transfers to comply with our ownership rules upon sale is consistent with Commission precedent.[1039] In keeping with the policy we adopted in 1975, the prohibition on the transfer of grandfathered stations will not apply to *pro-forma* changes in ownership or to involuntary changes of ownership due to a death or legal disability of the licensee.[1040]

488 *Eligible Transfer.* We are adopting an exception to our prohibition on the transfer of grandfathered combinations in violation of the new rules. This exception applies to grandfathered radio and television combinations that exceed the ownership limits adopted in this *Order*, cross-media combinations in at-risk markets, and cross-media combinations in small to medium sized markets that exceed the ownership limits adopted in this *Order*. Entities may transfer control of or assign a grandfathered combination to "eligible entities" as defined herein.[1041] In addition, "eligible entities" may sell existing grandfathered combinations without restriction. As we define in greater detail below, we limit "eligible entities" to small business entities, which often include businesses owned by women and minorities. We believe that facilitating new entry by and growth of small businesses in the broadcast

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[1037] NAB Comments in MM Docket No. 00-244 at 9, Clear Channel Comments in MM Docket No 00-244 at 6, Viacom Comments in MM Docket No 00-244 at 8; NAB Comments in MM Docket No. 01-317 at 51.

[1038] NAB Comments in MM Docket No 01-317 at 50-51, Clear Channel Comments in MM Docket No. 01-317 at 26, n 83, NAB Comments in MM Docket No 00-244 at 9; Entercom Comments in MM Docket No. 00-244 at 8.

[1039] *See 1970 Multiple Ownership First Report and* Order, 22 F.C.C.2d at 323 ¶ 2, 1975 *Multiple Ownership Second Report and Order*, 50 F C C.2d at 1076 ¶ 103, *Local TV Ownership Report and Order*, 14 FCC Rcd at 12965 ¶ 146 (any transfer of permanently grandfathered television combinations after 2004 must meet the television duopoly rule or waiver policies in effect at the time of the transfer). Contrary to Clear Channel and NAB's assertions, our decision is consistent with the *1992 Radio Ownership Order*, *supra* note 96. NAB Comments in MM Docket No. 00-244 at 30; Clear Channel Comments in MM Docket No. 00-244 at 7. In the *1992 Radio Ownership Order,* we relaxed the ownership limits, permitting entities to own more stations in local markets based on numerical caps, and we also adopted an audience share cap, which precluded acquisitions of stations if the combined audience share at the time the application was filed exceeded 25%. At the time the rules went into effect, no entity owned more than the numerical caps or owned stations with a combined audience share exceeding 25% Therefore, grandfathering existing combinations was not at issue.

[1040] *1975 Multiple Ownership Second Report and Order,* 50 FCC 2d at 1076 ¶ 103; *see also* 47 C.F.R. §§ 73.3555, note 4; 73.3540(f); 73.3541(b).

[1041] We are not grandfathering existing combinations of stations that exceed the ownership limits because of an attributable interest in a station pursuant to an LMA or JSA. Existing LMAs and JSAs that result in a combination of stations exceeding the ownership limits must be terminated at the time of the sale or within two years, whichever comes first.

industry will further our goals of promoting diversity of ownership as well as competition and localism [1042]

489 We define an "eligible entity" as an entity that would qualify as a small business consistent with SBA standards for its industry grouping.[1043] For example, the SBA small business size standard for radio stations is $6 million or less in annual revenue. For TV stations the limit is $12 million [1044] In addition, to tailor this exception to meet our public interest objectives and ensure that the benefits of this proposal flow as intended, we will further require that any transaction pursuant to this exception may not result in a new violation of the rules. Moreover, control of the eligible entity purchasing the grandfathered combination must meet one of the following control tests. The eligible entity must hold (1) 30% or more of the stock/partnership shares of the corporation/partnership, and more than 50% voting power, (2) 15% or more of the stock/partnership shares of the corporation/partnership, and more than 50% voting power, and no other person or entity controls more than 25% of the outstanding stock, or (3) if the purchasing entity is a publicly traded company, more than 50% of the voting power

490. In addition to the above, we will allow entities that meet the definition of "eligible entity" to transfer any existing grandfathered combination generally without restriction. We believe that small businesses that qualify as eligible entities require greater flexibility than do larger entities for the disposition of assets Restrictions on the sale of assets could disproportionately harm the financial stability of smaller firms compared to that of larger firms, which have additional revenue streams To prevent abuse of this policy, however, an eligible entity may not transfer a grandfathered combination acquired after the adoption date of this *Order* to an entity other than another eligible entity unless it has held the combination for a minimum of three years.[1045] Also, we will prohibit eligible entities from granting options to purchase, or rights of first refusal to prevent non-eligible entities from financing an acquisition in exchange for an option to purchase the combination at a later date Finally, any transaction pursuant to this policy may not result in a new violation of the rules.

491 Radio LMA Combinations As we discussed in the context of attributable JSAs in the Local Radio Ownership Section, there also may be instances in which an existing LMA may affect a licensee's compliance with the ownership limits adopted herein. As we stated in instances of attributable JSAs, because we do not want to unnecessarily adversely affect current business arrangements between licensees and brokers, we will give licensees two years from the effective date of this *Order* to terminate

[1042] MMTC suggests we define a category of "eligible purchasers" based on the eligibility standards set forth in S 267 "Telecommunications Ownership Diversity Act of 2003" Because that pending legislation contemplates further definition of eligible purchasers by the Treasury Department after passage, we do not rely on its terms and therefore, set forth our criteria based on our judgment and the record of this proceeding

[1043] *See* 13 C F R. § 121.201 (North American Industry Classification System (NAICS) code categories). The definition of small business for the radio industry is listed in NAICS code 515112, and the definition of a small business for the TV industry is listed in NAICS code 515120.

[1044] To determine qualifications as a small business, SBA considers the revenues of the parent corporation and affiliates of the parent corporation, not just the revenues of individual broadcast stations. *See* 13 C.F.R §§ 121.103, 121 105

[1045] We do not intend to restrict pro forma transfers of grandfathered combinations or transfer of control to heirs or legatees by will or intestacy if no new ownership violation would occur any LMAs that result in a violation of the new ownership limits, or otherwise come into compliance with the new rules. If the licensee sells an existing combination of stations within the two year grace period, it may not sell or assign the LMA to the buyer if the LMA causes the buyer to exceed the ownership limits adopted in this *Order*. Parties are prohibited from entering into an LMA or renewing an existing LMA that would cause the broker of the station to exceed the ownership limits.

492. *TV LMA Combinations.* In our *Local TV Ownership Report and Order*, we grandfathered LMA combinations that were entered into prior to November 5, 1996, through the end of our 2004 biennial review We do not alter this policy. These LMAs are not affected by the grandfathering policy adopted herein.

493 *TV Temporary Waivers* A few licensees have been granted temporary waivers of our local TV ownership rule, and some have filed requests for an extension of waivers that are currently pending, or have sought permanent waivers. Any licensee with a temporary waiver, pending waiver request, or waiver extension request must, no later than 60 days after the effective date of this *Order* or the date on which the waiver expires, whichever is later, file one of the following: (i) a statement describing how ownership of the subject station complies with the modified local TV ownership rule; or (ii) an application for transfer or assignment of license of those stations necessary to bring the applicant into compliance with the new rules

494 *Cross-Media Conditional Waivers.* A few licensees have been granted conditional waivers of the previous one-to-a-market rule. Although we are eliminating the current radio/television cross-ownership rules, we are adopting new cross-media limits. Parties that currently have conditional waivers for radio/television combinations must submit a statement to indicate whether the combination they hold (1) is located in an at-risk market, (2) is located in a small to medium size market, and (3) is in compliance with the cross-media limits. For the combinations that comply with the cross-media limits adopted herein, we will issue a letter replacing the conditional grant with permanent approval. For any combinations that violate the cross-media limits, we will issue a letter indicating that the combination will continue to be grandfathered until a decision in the 2004 Biennial Review is final. As part of the 2004 Biennial Review, we will review and reevaluate the status of such grandfathered combinations to determine whether they should continue to be grandfathered On a case-by-case basis, we will consider the competition, diversity, equity, and public interest factors the combinations may raise.

495. *Other Cross-Media Waivers.* Our cross-media limits are founded on the presumption that, by reason of cable carriage, television stations are available throughout the DMA to which they are assigned. We recognize, however, that this may not be true in every case. Accordingly, those requesting waiver of our cross-media limits may attempt to rebut this presumption in individual cases. For example, a television licensee assigned to a DMA to which only two other television stations are assigned (*i e.*, an at-risk market) may request a waiver of the bar on its ownership of a daily newspaper published within that DMA by demonstrating that the newspaper's community of publication neither receives television service from the station over-the-air nor through cable carriage.

2. Elimination of Flagging and Interim Policy

496. In August 1998, the Commission began "flagging" public notices of radio station transactions that, based on an initial analysis by the staff, proposed a level of local radio concentration that implicated the Commission's public interest concern for maintaining diversity and competition.[1046]

[1046] *See* Broadcast Applications, Rep No 24303 (Aug. 12, 1998).

Under this policy, the Commission flagged proposed transactions that would result in one entity controlling 50% or more of the advertising revenues in the relevant Arbitron radio market or two entities controlling 70% or more of the advertising revenues in that market.[1047] Flagged transactions were subject to a further competition analysis, the scope of which is embodied in the interim policy we adopted in the *Local Radio Ownership NPRM.*

497. We believe that the changes we make today to the market definition will address many of the market concentration concerns that led the Commission to begin flagging radio station transactions and to adopt the interim policy. By applying the numerical limits of the local radio ownership rule to a more rational market definition, we believe that, in virtually all cases, the rule will protect against excessive concentration levels in local radio markets that might otherwise threaten the public interest. To the extent an interested party believes this not to be the case, it has a statutory right to file a petition to deny a specific radio station application and present evidence that makes the necessary prima facie showing that the transaction is contrary to the public interest[1048] Accordingly, effective upon adoption of this *Order*, the Commission will no longer flag radio sales transactions or apply the interim policy procedures adopted in the *Local Radio Ownership NPRM* in processing them.

3. Processing of Pending and New Assignment and Transfer of Control Applications.

498. The processing guidelines below will govern pending and new commercial broadcast applications for the assignment or transfer of control of television and radio authorizations commencing as of the adoption date of this *Order*. These guidelines also cover pending and new modification applications that implicate our multiple ownership rules Applications filed on or after the effective date of this *Order* as well as applications that are still pending as of such effective date will be processed under the new multiple ownership rules, including, where applicable, the interim methodology for defining radio markets as adopted herein. The staff is directed to issue a Public Notice containing these guidelines contemporaneously with the adoption of this *Order*

- *New Applications* The Commission has established a freeze on the filing of all commercial radio and television transfer of control and assignment applications that require the use of FCC Form 314 or 315 ("New Applications"). We will revise application Forms 301, 314 and 315 to reflect the new rules adopted in the *Order*. The freeze will be in effect starting with the *Order's* adoption date until notice has been published by the Commission in the *Federal Register* that OMB has approved the revised forms Upon such publication, parties may file New Applications, but only if they demonstrate compliance with the new multiple ownership rules adopted in the *Order*, including where applicable, the interim methodology for defining radio markets outside Arbitron metros, or submit a complete and adequate showing that a waiver of the new rules is warranted. We will continue to allow the filing of short-form (FCC Form 316) applications at any time and will process them in due course.

- *Pending Applications.* Applicants with long-form assignment or transfer of control applications (FCC Form 314 or 315) or with modification applications (FCC Form 301) that are pending as of adoption of the *Order* ("Pending Applications") may amend those Applications by submitting new multiple ownership showings to demonstrate compliance

[1047] *See AMFM, Inc* , 15 FCC Rcd at 16066 ¶ 7 n 10

[1048] 47 U.S.C. § 309(d).

with the ownership rules adopted in the *Order*, including where applicable, the interim methodology for defining radio markets outside of Arbitron metros, or by submitting a request for waiver of the new rules [1049] Parties may file such amendments once notice has been published by the Commission in the *Federal Register* that OMB has approved the information collection requirements contained in such amendments. Pending Applications that are still pending as of the effective date of the new rules will be processed under the new rules Applications proposing *pro forma* assignments and transfers (FCC Form 316) will be processed in the normal course.

- *Pending Petitions and Objections.* Petitions to deny and informal objections that were submitted to the Commission prior to the adoption date of the *Order* and that raise issues unrelated to competition against Pending Applications (as defined above) will be addressed with respect to those issues at the time we act on such Applications Petitions and informal objections that were submitted to the Commission prior to the adoption date of the *Order* and that contest Pending Applications solely on grounds of competition pursuant to the interim policy[1050] will be dismissed as moot.

VII. NATIONAL OWNERSHIP RULES

499. In this section, we consider the national TV ownership rule and the dual network rule. We conclude that we should modify the former by raising the cap to 45%, and we retain the latter.

A. National TV Ownership Rule

500. The current national TV ownership rule prohibits any entity from owning televisions stations that in the aggregate reach more than 35% of the country's television households.[1051] In the *Notice*, we sought comment on whether we should retain, eliminate, or modify this rule.[1052] We asked whether the current rule is necessary in the public interest as the result of competition and whether it promotes the goals of competition, diversity, and localism.[1053] We also solicited comment on whether UHF television stations should continue to be attributed with only 50% of the television households in their DMA market or whether cable and DBS carriage of UHF signals eliminates the need for this "UHF

[1049] The Commission may determine that the nature of the amendment warrants a new public notice for the Pending Application

[1050] *See Local Radio Ownership NPRM,* 16 FCC Rcd at 19894-97 ¶¶ 84-89.

[1051] Section 73 3555(e)(1) of the Commission's rules provides that "[n]o license for a commercial TV broadcast station shall be granted, transferred or assigned to any party (including all parties under common control) if the grant, transfer or assignment of such license would result in such party or any of its stockholders, partners, members, officers or directors, directly or indirectly, owning, operating or controlling, or having a cognizable interest in TV stations which have an aggregate national audience reach exceeding thirty-five (35) percent." 47 C.F.R § 73 3555(e)(1) Reach is determined by the number of television households in a DMA 47 C.F.R § 73 3555(e)(2).

[1052] *Notice*, 17 FCC Rcd at 18543-52 ¶¶ 126-55.

[1053] *Id* at 18544 ¶ 129.

discount."[1054] We conclude that the current rule cannot be justified and we raise the cap to 45% We retain the UHF discount.

501. In the *1984 Multiple Ownership Report and Order*, we determined that repealing the national TV ownership rule would not harm competition or diversity.[1055] Consistent with our decision in 1984, we find that restricting national station ownership is not necessary to promote either of those policy objectives. We depart, however, from our 1984 decision to repeal the rule because evidence in the record demonstrates that the national television cap serves localism. The localism rationale for retaining the national television cap was articulated in our *1998 Biennial Review Report* In that decision we explained that preserving a balance of power between the networks and their affiliates serves local needs and interests by ensuring that affiliates can play a meaningful role in selecting programming suitable for their communities.[1056] We continue to believe that to be the case and, consequently, that a national cap is necessary to limit the percentage of television households that a broadcast network may reach through the stations it owns Although the record supports retention of a national ownership cap, it does not support a cap of 35%. The evidence before us shows that the cap at the current level is not necessary to preserve the balance of bargaining power between networks and affiliates. The record also indicates that the cap appears to have other drawbacks Most importantly, the cap restrains some of the largest group owners – broadcast networks – from serving additional communities with local news and public affairs programming that is of greater quantity and at least equal, if not superior, quality than that of affiliates. Moreover, we believe that a modest relaxation of the cap will help networks compete more effectively with cable and DBS operators and will promote free, over-the-air television by deterring migration of expensive programming to cable networks Balancing these competing interests, we raise the national cap from 35% to 45%.

1. Background

502 Since 1941, the Commission has limited the national ownership reach of television broadcast stations [1057] The Commission has modified the restriction several times to keep pace with the changing marketplace [1058] In 1984, the Commission repealed the rule, concluding that it was not necessary to promote competition or diversity, and instituted a six-year transitional ownership limit of

[1054] *Id* at 18544 ¶¶ 130-31 *See* 47 C F R § 73 3555(e)(2)(i).

[1055] *1984 Multiple Ownership Report and Order*, 100 F C C.2d at 46, 50-56 ¶¶ 86, 97-114 (repealing the station ownership restriction and instituting a six-year transitional ownership limitation of 12 stations). The Commission subsequently reversed its decision to repeal the rule. *1985 Multiple Ownership MO&O*, 100 F.C.C 2d at 88-92 ¶¶ 33-40 (eliminating the sunset provision and adding a 25% cap on national audience reach, calculated as a percentage of all Arbitron ADI television households).

[1056] *1998 Biennial Review Report*, 15 FCC Rcd at 11074-75 ¶30

[1057] *Notice*, 17 FCC Rcd at 18543 ¶ 127.

[1058] *See Broadcast Services Other Than Standard Broadcast*, 6 Fed. Reg 2282, 2284-85 (May 6, 1941) (imposing a national ownership limit of three television stations); *Rules Governing Broadcast Services Other Than Standard Broadcast*, 9 Fed Reg 5442 (May 23, 1944) (raising the ownership limit from three to five stations), *Amendment of Multiple Ownership Rules*, 43 F C.C. 2797, 2801-02 ¶ 14 (1954) (raising the ownership limit from five to seven stations) twelve television stations nationwide.[1059] On reconsideration, the Commission affirmed its underlying conclusions, but it eliminated the sunset provision out of a concern that repealing the rule would create a disruptive restructuring of the national broadcasting industry [1060] The Commission retained the twelve station limit and, in addition, prohibited an entity from reaching more than 25% of the country's television households through the stations it owned.[1061]

503 In 1996, the Commission adopted the current 35% cap in response to the Congress' directive to raise the cap (from 25% to 35%) and to eliminate the rule that an entity could not own more than twelve stations nationwide.[1062] The Commission subsequently affirmed the 35% cap as part of its 1998 biennial review of media ownership regulations.[1063] In affirming the cap, the Commission reasoned that it would be premature to institute revisions to the national TV ownership limit before fully observing the effects of changes to the local TV ownership rules and the effects of raising the cap from 25% to 35% [1064] The Commission also concluded that the national TV ownership rule helps promote better service to local communities by preserving the power of affiliates to negotiate with the networks and to make independent programming decisions [1065] In addition, the Commission concluded that the national TV ownership rule facilitates competition in the program production market and in the national advertising market.[1066]

504 Several broadcast networks challenged the Commission's decision to retain the national TV ownership rule In *Fox Television Stations, Inc v. FCC*, the U.S Court of Appeals for the District of Columbia Circuit found that the Commission's 1998 decision to retain the rule was arbitrary and capricious, and it remanded the rule for further consideration.[1067] The court rejected the Commission's "wait-and-see" approach on the grounds that it was inconsistent with the Commission's statutory mandate to determine on a biennial basis whether its rules are necessary in the public interest.[1068] The court also held that the Commission failed to demonstrate that the national cap advanced competition, diversity, or localism.

505 With respect to competition, in its *1998 Biennial Review Report*, the Commission provided a study and a table showing that large group owners of television stations had acquired additional stations

[1059] *1984 Multiple Ownership Report and Order*, 100 F C C 2d at 46, 54-56 ¶¶ 86, 108-114.

[1060] *1985 Multiple Ownership MO&O*, 100 F.C.C.2d at 88-92, 97 ¶¶ 33-40, 52.

[1061] *Id*

[1062] *Implementation of Sections 202(c)(1) and 202(e) of the Telecommunications Act of 1996 (National Broadcast Television Ownership and Dual Network Operations)*, 11 FCC Rcd 12374 (1996)

[1063] *1998 Biennial Review Report*, 15 FCC Rcd at 11072-75 ¶¶ 25-30

[1064] *Id.* at 11072-74 ¶¶ 25-29

[1065] *Id.* at 11074-75 ¶ 30.

[1066] *Id.* at 11073 ¶ 26 n.78.

[1067] 280 F.3d 1027.

[1068] *Id* at 1042

and increased their audience reach since the 1996 Act's passage.[1069] The court was not persuaded by the Commission's evidence that large group owners have undue market power, and it agreed with the networks that the figures alone, absent evidence of an adverse effect on the market, were insufficient to support retention of the rule.[1070] The court also found unsupported the Commission's statement in the *1998 Biennial Review Report* that the national cap is necessary to safeguard competition in the national advertising or program production markets.[1071] The court concluded that the Commission's analysis of the state of competition in the television industry was incomplete and did not satisfy the requirement under Section 202(h) to show that the rule is necessary in the public interest as the result of competition.[1072]

506 The court held that diversity and localism are valid public interest goals within the context of broadcast regulation and made it clear that the Commission could determine that the national TV ownership rule was necessary in the public interest under Section 202(h) if it served either interest.[1073] The court, however, ruled that the Commission had not provided sufficient evidence that either one of these goals was served.[1074] The court noted that the Commission, in its *1998 Biennial Review Report*, "mentioned national diversity as a justification for retaining the [national TV ownership rule], but did not elaborate upon the point."[1075] The court found the Commission's statement did not explain why the rule is necessary to further national diversity. The court also found that the Commission failed to justify its departure in the 1998 decision from its 1984 decision, in which the Commission concluded that the national TV ownership restriction should be phased out after six years because. (1) the rule no longer was necessary for national diversity given the abundance of media outlets and (2) a national rule was irrelevant to local diversity.[1076] In addition, the court held that the Commission did not adequately demonstrate that the rule strengthens the bargaining power of independently-owned affiliates and thereby promotes program diversity, particularly in light of its 1984 conclusion that no evidence suggested that stations that are not group-owned responded better to community needs or spent proportionately more revenue on local programming.[1077] However, the court acknowledged the Commission's right to reverse course, provided the reversal is supported by a reasoned analysis.[1078] Recognizing that sufficient evidence may exist to justify the national TV ownership rule, the court determined that the appropriate

[1069] *Id* at 1041-42 (citing *1998 Biennial Review Report*, 15 FCC Rcd at 11073 ¶ 27).

[1070] *Id* at 1042

[1071] *Id* (citing *1998 Biennial Review Report*, 15 FCC Rcd at 11073 ¶ 26 n 78)

[1072] *Id* at 1044

[1073] *Id* at 1042

[1074] *Id* at 1042-43

[1075] *Id.* at 1042 (citing *1998 Biennial Review Report*, 15 FCC Rcd at 11073 ¶ 26 n.78).

[1076] *Id* at 1034, 1042-45. *See 1984 Multiple Ownership Report and Order*, 100 F.C.C 2d at 27, 30-31, 37 ¶¶ 31-33, 43, 60.

[1077] *Fox Television*, 280 F 3d at 1043 (citing *1984 Multiple Ownership Report and Order*, 100 F.C.C.2d at 35 ¶ 53).

[1078] *Id.* at 1044-45